MASTIARA SDN BHD

v.

MOTORCYCLE INDUSTRIES (M) SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-02-790-97]
28 DECEMBER 1998

CONTRACT: *Specific performance - Sale and purchase of land - Failure to take opportunity to complete sale - Whether could claim specific performance - Vendor unable to transfer land initially - Subsequent court order allowing vendor to proceed with sale - Whether purchaser ought to have completed sale and claim damages for late delivery*

The appellant entered into an agreement to purchase land belonging to the first respondent. The second and third respondents were receivers and managers of the first respondent, a company in receivership. Further to the said agreement, a deposit was paid and this was followed by the payment of the balance of the purchase price. However, since the directors of the first respondent company refused to execute the transfer of the land, the appellant's solicitors requested the return of the balance of the purchase price to hold until the transfer had been duly executed. The respondents duly acquiesced to this request. Consequently, the appellant filed a writ claiming specific performance of the agreement, alternatively damages for breach of contract or, in the alternative, damages *in lieu* of specific performance and a declaration that the appellant is entitled to a lien on the properties for the deposit with interest thereon.

Subsequently, the respondents informed the appellant that since a court order allowing the receiver and managers to proceed with the sale had been obtained, they were finally in a position to obtain and deliver an executed memorandum of transfer to the appellant and thus they requested the appellant to forward the balance of the purchase price for the purpose of completing the sale. The appellant, however, did not respond in any way and thus the respondents contended that the appellant is not entitled to the reliefs prayed for.

The trial judge dismissed the appellant's claim and allowed the respondents to forfeit the deposit paid. Being dissatisfied, the appellant appealed.

Held:
Per Abdul Malek Ahmad JCA

[1] The respondents were ready to give specific performance after having obtained the necessary court order and the appellant could have completed the sale and continued with the claim for damages for late delivery.

[2] In the circumstances, the appellant was at fault for not responding to the respondents' request to complete the sale upon obtaining the necessary court orders and thus it was quite right for the trial judge to dismiss the claims and forfeit the deposit.

[Appeal dismissed with costs.]

Cases referred to:
Ganam Rajamany v. Somoo Sinnah [1984] 2 MLJ 290 ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 ***(refd)***

For the appellant - Murali Navaratnam; M/s Ghazi & Lim
For the respondents - Dato' Zaki Tun Azmi (J Doshi & S Thomas with him); M/s Abdullah & Zainuddin

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-29-1982]

Reported by S Dharmendran

JUDGMENT

Abdul Malek Ahmad JCA:

According to the statement of claim dated 13 January 1982, by an agreement dated 15 June 1979 between the plaintiff, the appellant before us, a private limited company having its place of business in Alor Setar, Kedah, and the first defendant, the first respondent in this appeal, a company running its business in Kuala Lumpur, it had been agreed by the third respondent that the first respondent would sell, and the appellant would purchase, the lands held under Pegangan 536, 537 and 538 respectively in Bandar Jelutong, Section 1, Daerah Timor Laut, Penang together with the three shophouses erected respectively thereon known as Nos. 411A, 411B and 411C Jalan Jelutong Penang for RM510,000. The second and third defendants, now the second and third respondents, are receivers and managers of the first respondent.

Under the agreement, the appellant was to pay a deposit of RM51,000 to the first respondent, which they did, and that the balance of RM459,000 was to be paid to the first respondent's solicitors on or before the date of completion which was 14 August 1979 upon which the first respondent was to deliver to

the appellant a valid and registrable memorandum of transfer of the said properties free from all encumbrances together with the documents of title thereto. Time was to be of the essence of the agreement.

On 10 August 1979, the appellant forwarded to the first respondent's solicitors a cheque for RM459,000 being the balance of the purchase price. However, on 28 September 1979, the third respondent verbally informed the appellant that the directors of the first respondent had refused to execute the transfer and as a result they were returning the balance of the purchase-price to the appellant's solicitors to hold the same until the transfer had been duly executed.

Consequently, the appellant had asked for specific performance of the agreement, alternatively damages for breach of contract or, in the alternative, damages *in lieu* of specific performance and a declaration that the appellant is entitled to a lien on the properties for the deposit with interest thereon.

In their statement of defence amended pursuant to a court order dated 5 December 1979, the respondents pleaded that the first respondent is a company in receivership. Further, the second and third respondents had been conferred the power and authority to sell the assets and the property of the first respondent under the debenture issued by the first respondent on 25 January 1977 but state that actually in law the third respondent had no power to sell the assets.

The first respondent also admitted having received a deposit of RM51,000 and although they had told the appellant that it would be refunded, the appellant had informed the respondents that they will not accept a refund. The balance of the purchase price amounting to RM459,000 however, had been refunded.

The respondents now contend that no valid and registrable memorandum of transfer had been forwarded as the respondents have no power to sell or transfer the properties. They had taken all reasonable measures to secure the execution by the directors of the first respondent of the transfer of the properties but they had failed or neglected to do so.

Subsequently, by a letter dated 23 February 1987, the respondents had through their solicitors informed the solicitors for the appellant that the respondents were in a position to obtain and deliver to the appellant an executed memorandum of transfer and required the appellant to forward the balance of the purchase price amounting to RM459,000.

There was no response from the appellant. By a letter dated 3 April 1987, the solicitors for the respondents had written to the solicitors for the appellant requesting a reply within seven days failing which the respondents would forfeit the deposit and terminate the agreement.

Again, there was no response from the appellant. It is therefore the respondents' contention that because of the failure to respond, the appellant is not entitled to the reliefs prayed for.

Before us, learned counsel for the appellant submitted that there were actually only two issues to be considered. The first was whether the receivers and managers had the power to sell in view of the Supreme Court decision in *Kimlin Housing Development Sdn Bhd (Appointed Receivers and Managers) (In Liquidation) v. Bank Bumiputra (M) Bhd. & Ors.* [1997] 3 CLJ 274; [1997] 2 MLJ 805 where it was decided, among other things, that the provisions of the National Land Code setting out the rights and remedies of parties under a statutory charge over land comprised in Part XVI of the Code are exhaustive and exclusive and any attempt at contracting out of those rights, unless expressly provided for in the Code, would be void as being contrary to public policy. The court, therefore, held that the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the Code to obtain a judicial sale.

On this point, the learned trial judge had this to say:

> I must say that very clear and learned submissions have been forwarded by learned counsel for both sides which makes it easier for me to decide.
>
> Briefly, the submission of the learned counsel for the Plaintiff is that *Kimlin's* case does not apply to the instant case because in *Kimlin's* the charges are legal or statutory charges whereas in this case the charge is an equitable charge.
>
> So, the first question which I have to decide is whether our law recognises equitable charges. It appears to me that this point is settled. All I have to do is to refer to the case of *Mahadevan & Anor v. Manilal & Sons (M) Sdn. Bhd.*[2] [1984] 1 MLJ 266, a decision of the Federal Court which is binding on this court. In that case, it was held, *inter alia,* that there was no provision in the National Land Code prohibiting the creation of equitable charges or liens. Therefore equitable charges and liens are permissible under our land law. See also *Malayan Banking Berhad v. Zahari bin Ahmad* [1988] 2 MLJ 135.

Then, after referring to the finding in *Kimlin's* case *(supra)*, he made the following observation:

> What does this mean? Does it mean that all dealings in land or involving land can only be done as provided by the National Land Code and no other? I do not think that that is what the judgment means. I so say because, it is now well-established that "jual janji" and bare trustee concept, to name only two, are recognised by our courts, even though they are clearly not provided by the Code.

Further more, the charges in question in *Kimlin's* case were registered under the National Land Code. Therefore, in my humble opinion, the better view is that, in view of the decision of the Federal Court in *Mahadevan's* case, what is said in *Kimlin's* case should be confined to charges registered under the Code. In other words, if a charge is registered under the Code, the remedy must be in accordance with the Code. If the charge is an equitable charge, outside the Code, the Code does not apply and chargee may enforce the remedy provided in the debenture. Otherwise, there would be a lacuna. The law (courts) recognises equitable charges but no remedy is available.

For these reasons, I agree with the submission of learned Counsel for the Plaintiff, that *Kimlin's* case does not apply to the present case, the charge here being an equitable charge, and therefore the receivers and managers have power, which was given by the debenture, to sell the said properties.

Learned counsel for the appellant explained that they had included this ground in the memorandum of appeal before the judgment was released but since the learned trial judge found in their favour as regards this issue, he was abandoning the point. And since learned counsel for the respondents did not touch on this issue despite being the party that raised it, we will not deal with it. In fact, it was our finding that the issue was of no relevance in the first place.

The second issue is whether the appellant was ready and willing to perform the obligation under the sale and purchase agreement. The relevant agreement was entered into on 15 June 1979 between the appellant and the first respondent. RM51,000 equivalent to ten per cent of the contract price was paid on 26 May 1979.

Clause 3 of the agreement stipulated that the completion date was on 14 August 1979 but four days earlier, on 10 August 1979, the appellant had paid the balance of the purchase price amounting to RM459,000.

The first respondent, however, could not deliver a valid and registrable title to the appellant as they could not get the directors to execute the transfer. On 28 September 1979, the then solicitors for the appellant wrote the following letter:

September 28, 1979.

EXPRESS A.R. REGISTERED.

Dear Sirs,

Re: Grant (First Grade) Nos. 3482, 3483 & 3484 Lots Nos. 536, 537 & 538 Section 1 Bandar Jelutong N.E.D. Penang together with the respective shophouses thereon No. 411-A, 411-B & 411-C Jelutong Road, Penang.

We refer to the telephone conversation between your Encik Abdullah Bin Mohd. Yusof and our Mr. C.S. Chan this afternoon.

The Receiver and Manager of Motorcycle Industries (M) Sdn. Bhd. Mr. Leong Siew Wing has informed our clients this afternoon in his office in Penang that the Directors of the Company have refused to execute the Memorandum of Transfer in favour of our clients, and that efforts are still being made to persuade the Directors to execute the Transfer. As we have already paid the purchase price in full your clients are therefore in breach of the Sale Agreement dated June 15, 1979. Furthermore the properties are encumbered by a Private Caveat in favour of Yamaha Motor Co. Ltd.

Mr. Leong was also unable to give our clients any indication as to when the Transfer could be executed and delivered to us. In these circumstances our clients are compelled to request you to return the balance purchase price of $459,000.00 to us **immediately** for us to hold until the Transfer has been duly executed in their favour whereupon we shall forward the said sum to you.

Kindly therefore let us have the said sum as a matter of urgency. Please note that this request is made strictly **without prejudice** to our client's rights under the Sale Agreement, including the right to have the sale completed.

Yours faithfully,
(Sgd.)

M/s Tunku Zuhri, Manan & Abdullah,
Advocates & Solicitors,
KUALA LUMPUR.

c.c. M/s Mastiara Sdn. Bhd.

The balance of the purchase price was refunded to the appellant on the same date without prejudice to the appellant's right pursuant to the contract. It must be observed here that by virtue of cl. 9 of the agreement, time was of the essence.

The appellant waited two and a half years to see if the registration could be effected and the writ leading to this appeal was filed on 13 January 1982. Learned counsel for the appellant clarified that the delay in filing of the writ was because of the ongoing correspondence between the parties between the 2 October 1979 to 20 May 1981.

Essentially, the prayers in the writ were an application for specific performance and damages for breach of contract or damages *in lieu* of specific performance and for a declaration that the appellant were entitled to a lien on the properties for their deposit. According to the appellant, the first respondent was wound up on 4 February 1985 but they were not informed. Only on 30 January 1992 did the appellant obtain leave to proceed against the first respondent.

On 23 February 1987, the respondents wrote the following letter:

23rd February 1987

M/s Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Beach Street
P.O. Box 81
PENANG

Dear Sirs

Re: Motorcycle Industries (M) Sdn Bhd Sale of lands held under Pegangan No. 536, 537 and 538 Bandar Jelutong Penang High Court Suit No. 29 of 1982

We refer to the above matter and to the Writ of Summons and Statement of Claim in this civil suit filed by your client.

The main claim in this civil suit is that the Plaintiff prays for specific performance of the contract entered into between the Plaintiff and the Receivers and Managers of Motorcycle Industries (M) Sdn Bhd. In light of the said claim we have now obtained a Court Order allowing the Receivers and Managers to proceed with the sale and to execute the Memorandum of Transfer.

In the circumstances could you kindly on behalf of your client forward us the balance purchase price of $459,000.00 and upon receipt of same, we on behalf of our client will obtain a Memorandum of Transfer duly executed by the vendors for your further action and registration.

As the same is a long outstanding matter, we hope you will give same your urgent attention and revert to us accordingly with the balance purchase price.

Thanking you.

Yours faithfully,

(Sgd.)

cc: Clients (Ref: REC. KS. lts).

Learned counsel for the appellant explained that they did not respond because they felt that the suit spoke for itself and it was too late for the respondents to complete the sale and purchase and blame the appellant for not being ready and willing to pay the balance. They relied on *Ganam d/o Rajamany v. Somoo s/o Sinnah* [1984] 2 MLJ 290 where the Federal Court held that it is not sufficient for a purchaser to prove that he had at all times been ready and willing to complete the sale; he must also prove that he had performed or had been at all times ready and willing to perform his part of the contract,

or his part of the obligations of the contract as fixed or interpreted by the court. Since the respondent was unable to bring his case under this principle, the learned Judicial Commissioner was wrong to decree an order that the contracts be specifically performed.

Leading counsel for the respondents argued that the failure to complete the sale was not the fault of the respondents but the fault of the directors of the first respondent which was beyond their control. He pointed out that the last date of the correspondence between the parties was 20 May 1981 but the suit was filed only on 13 January 1982. This showed that there was some delay in the filing of the action.

On 23 February 1987, the appellant was asked to complete the sale as the respondents had obtained the necessary court order as follows:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)

C-31-175-86

In the matter of Motorcycle Industries (M) Sdn Bhd

And

In the matter of the Companies Act 1965

Between

Cyril Elphege Gomez ... Applicant

And

Official Receiver, Malaysia ... Respondent

BEFORE THE HONOURABLE MR JUSTICE GUNN CHIT TUAN
THIS 25TH DAY OF NOVEMBER, 1986 IN CHAMBERS
ORDER

UPON the application of the Applicant abovenamed **AND UPON READING** the Originating Summons dated the 1st day of July, 1986, the Affidavit of Cyril Elphege Gomez affirmed on the 1st day of July, 1986 both filed herein **AND UPON HEARING** Miss Jyotsana Doshi of Counsel for the Applicant abovenamed and Puan Soraya on behalf of the Official Receiver, Malaysia **IT IS ORDERED** that the Applicant as Receiver and Manager of Motorcycle Industries (M) Sdn Bhd be and is hereby authorised to complete the sale of all that piece of land held under Pegangan No. 536, 537 and 538, Bandar Jelutong, Seksyen 1, Daerah Timur Laut, Pulau Pinang together with the buildings erected thereon to Mastiara Sdn Bhd pursuant to the Agreement dated

the 15th day of June, 1979 **AND IT IS ORDERED** that the Official Receiver, Malaysia be and is hereby authorised to execute the Memorandum of Transfer over the land held under Pegangan No. 536, 537 and 538, Bandar Jelutong, Seksyen 1, Daerah Timur Laut, Pulau Pinang for and on behalf of Motorcycle Industries (M) Sdn Bhd together with the buildings erected thereon in favour of Mastiara Sdn Bhd **AND IT IS LASTLY ORDERED** that the costs of this application be paid from the proceeds of sale of the said lands.

Dated the 25th day of November, 1986.

Sgd.

...
Senior Assistant Registrar,
High Court, Kuala Lumpur.

This Order is filed by M/s Tunku Zuhri, Manan & Abdullah, Solicitors for the Applicant herein whose address for service is at 31st Floor, Menara Tun Razak, Jalan Raja Laut, Kuala Lumpur.

(REF: JD/12709/82/RN).

The respondents were ready to give specific performance on 23 February 1987 and the appellant could have completed the sale and continue with the claim for damages for late delivery. They, however, chose not to respond to the demand. This may be, according to leading learned counsel for the respondents, that they wanted the properties in 1979 and prices had dropped in 1987 because of the recession which started in 1986. However, in 1989 they changed their minds.

On 3 April 1987 the respondents wrote the following letter:

3rd April 1987

A.R. REGISTERED

M/S Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Beach Street
10300 Penang

Dear Sirs,

Re: Motorcycle Industries (M) Sdn Bhd Sale of lands held under Pegangan No. 536, 537 and 538 Bandar Jelutong Penang High Ct Suit No. 29 of 1982

We refer to the above matter and to our letter dated 23.2.87 and regret to note that todate there has been no reply whatsoever to same.

In the circumstances we have our client's instructions to request a reply within seven (7) days from the date of receipt hereof, failing which our client will take such steps as are necessary to forfeit the deposit and terminate the agreement forthwith. The said forfeiture and termination will be without prejudice to our client's rights and/or recourse to any other legal remedies pursuant to the Sale and Purchase Agreement.

Yours faithfully

(Sgd)

cc: Clients (Ref: REC.KS.lts).

The learned trial judge had stated in his judgment as follows:

In this case ten years had passed from the date the Receivers and Managers requested the Plaintiffs to pay the balance purchase price, the Plaintiffs had not even given any response nor pay the amount. All that the Plaintiffs did was to obtain an *ex-parte* injunction to prevent the sale to the Second Purchasers.

If the Plaintiffs were all the time ready and willing to complete the sale all they could have done was to pay the balance purchase price which they were asked to pay. At the very least they could have responded to ask for a reasonable time to be fixed to make the payment. They did neither.

In the circumstances, I am of the view that this is not a case in which the court should exercise its discretion to grant a decree of specific performance.

The Plaintiffs also claimed "further or alternatively damages for breach of contract".

On the facts of this case I do not think that the First Defendant was in breach of the contract. During the first period, the Receivers and Managers had done all they could to have the Memorandum of Transfer executed but failed. Plaintiffs did not then file this action yet. Instead the Plaintiffs requested for the balance purchase to be returned which was returned. When the Receivers and Managers finally were in a position to complete the transaction and requested the Plaintiffs to pay the balance purchase price, there was no response from the Plaintiffs until now. The Defendant had made it very clear in their letter dated 3rd April 1987 that they would forfeit the deposit and terminate the Agreement if they did not receive a reply. No reply come from the Plaintiffs either within the stipulated time or at any time thereafter. In the circumstances, it would not be correct to say that the Defendant had breached the contract.

The Plaintiffs also claimed "in the alternative damages for breach of contract."

a This remedy is applicable where a Plaintiff having succeeded in his case, but for some reason, for example where the land is already registered in the name of *bona fide* purchaser and is therefore unable to be transferred to the Plaintiff, in such a case the court may order that damages be paid *in lieu* of specific performance. That is not the case here. The Plaintiffs fail in their claim because they have failed to perform their part of the contract. Therefore the question b of damages in lieu of specific performance does not arise.

Prayer (iv), lien on the said properties, is a non issue in view of my judgment on the other prayers.

Lastly, concerning the deposit. The Plaintiff did claim for the refund of the c deposit in case their claim fails. Further, as I have mentioned, the Defendant had made it very clear in their Solicitors letter dated 3rd April 1987 that they would forfeit the deposit if they received no reply from the Plaintiff. In the circumstances I think that the Defendant is entitled to forfeit the deposit.

It was our unanimous finding that in these circumstances, the appellant was d at fault for not responding to the respondents' letters dated 23 February 1987 and 3 April 1987 and it was quite right for the learned trial judge to dismiss the claims and to forfeit the deposit. We, therefore, dismiss the appeal with costs. The deposit is to go to the respondents to account of their taxed costs.

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